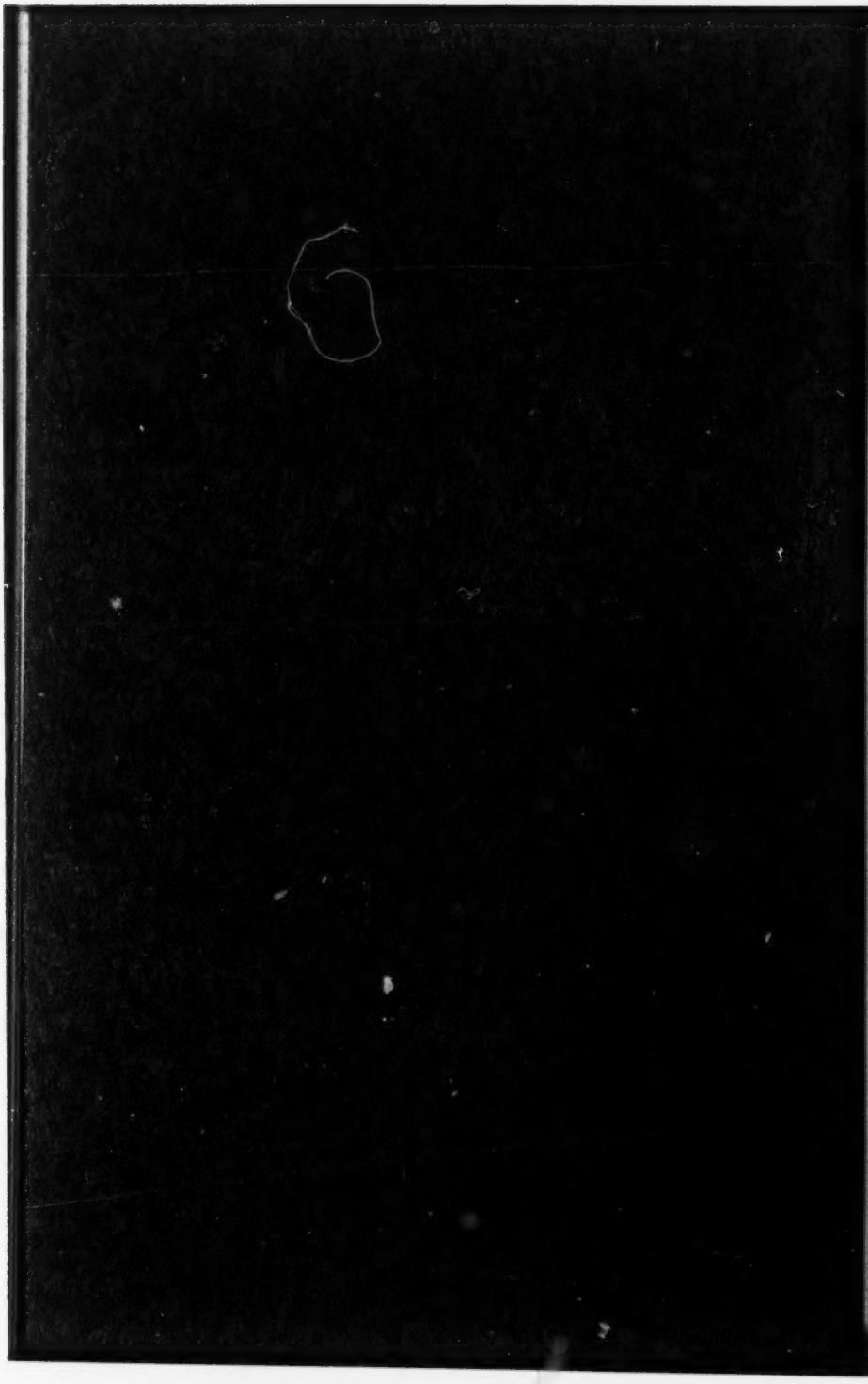

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. ——

UNITED STATES, PETITIONER

v.

MONTGOMERY WARD & COMPANY, INC.,[1] ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the District Court in this case.

OPINION BELOW

The opinion of the District Court (R. 707) has not yet been officially reported.

JURISDICTION

The judgment of the District Court was entered on January 27, 1945 (R. 725). On February 5, 1945, the Government docketed its appeal with the Circuit Court of Appeals for the Seventh Circuit (R. 729), and now files this petition for writ

[1] Hereinafter referred to as Ward.

of certiorari prior to consideration of the case by that court. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C., Sec. 347 (a).

QUESTIONS PRESENTED

(1) Whether the President had authority, under either the War Labor Disputes Act or the Constitution or both, to order the taking of possession and operation of certain properties of the defendant corporation.

(2) If the President has such authority, whether Executive Order No. 9508 was a valid exercise of that power.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The principal statutes involved are the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. (Supp. III), Secs. 1501–1511 and Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892, 50 U. S. C. App. Sec. 309. The principal executive orders involved are Executive Order No. 9508, of December 27, 1944, authorizing the Secretary of War to take over the properties involved, and Executive Order No. 9017, of January 12, 1942 (7 Fed. Reg. 237), establishing the War Labor Board. The statutes and executive orders are set forth in the appendix to this petition.

STATEMENT

The United States brought this action in the District Court for a declaratory judgment and

for injunctive relief under Secs. 24 (1) and 274d of the Judicial Code, 28 U. S. C. Secs. 41 (1) and 400. The case was submitted to the District Court on the pleadings, affidavits, and briefs and it was agreed upon argument that the hearing would be followed by final judgment, which was rendered.

The basic facts as shown by the affidavits and the opinion of the District Court are as follows:

(1) *Executive Order No. 9508.*

On December 27, 1944 the President issued Executive Order No. 9508 (Appendix, p. 39) directing the Secretary of War to take possession of and operate the plants and facilities of Ward in Jamaica, New York; Detroit, Dearborn, Royal Oak, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California, and Portland, Oregon. In this Executive Order the President made the following findings, required for the exercise of the power granted by sec. 3 of the War Labor Disputes Act: that because of labor disturbances in these properties there were existing and threatened interruptions of Ward's operations which would unduly impede the war effort and that these interruptions could be avoided only by Government operation. The Secretary of War designated Lieutenant General Somervell to act for him in carrying out the Executive Order, and on December 28, 1944, Major General J. W. Byron, by direction of

Lieutenant General Somervell, took possession of the properties.

In each of the plants specified in the Order a labor dispute existed between Ward and its employees. The National War Labor Board had taken jurisdiction in each of these disputes and had issued in each case a final order deciding the dispute and providing terms and conditions to govern the relations between the parties. In each case Ward had refused to settle the dispute on the basis of the Board's order. At the time the Order was issued a strike existed in the Detroit plant of Ward and on December 28, 1944, immediately prior to the taking of possession of the Chicago plant of Ward, a new strike occurred in the Chicago plant.

The background, legal and factual, of the President's action may be more fully outlined as follows:

(2) *Development of the procedures established by the President and the Congress for the peaceful settlement of labor disputes and for the stabilization of prices and wages during the war.*

As a result of the large number of strikes in the winter of 1940–41, the President, on March 19, 1941 (Executive Order No. 8716, 6 Fed. Reg. 1532), established the National Defense Mediation Board. This Board handled a great number of disputes. On certain occasions the parties to those disputes refused to accept the recommendations of the Board, and on three occasions the

President was required to avoid interruptions to operations deemed essential during the then existing national emergency by taking possession of plants and facilities. (A list of all seizures by Presidential Order is included in the Appendix, p. 51).

Ten days after the attack on Pearl Harbor the President, on December 17, 1941, convened a conference of representatives of labor and industry. This conference resulted in agreement that there should be no strikes or lockouts for the duration of the war, that all disputes should be settled by peaceful means, and that a tripartite board should be established to settle labor disputes. On January 12, 1942, the President, to make effective the recommendations of this conference, established the National War Labor Board by Executive Order No. 9017 (7 Fed. Reg. 237, Appendix, p. 47). This Board decided a great number of disputes, and in almost every instance its recommendations were accepted by the parties to the dispute. However, on a few occasions the Board's directives were not followed, and when serious danger to the conduct of the war impended as a result, the President took possession of particular plants and facilities. The last such incident prior to the passage of the War Labor Disputes Act was the taking of possession of the coal mines.

During the period of possession by the Government of the coal mines, Congress passed the War Labor Disputes Act on June 25, 1943, with the

express purpose of giving statutory status to the War Labor Board and of strengthening and clarifying the powers of the Board and of the President. Since its creation, the War Labor Board has handled approximately 8,000 labor disputes affecting nearly 12,000,000 workers. (Davis affidavit, R. 69, 70.) The Board has become an indispensable factor in the program of the Government for the prevention of industrial conflict and inflation and for the stabilization of the national war-time economy.

(3) *Description of the nature of Ward's business.*

Ward is one of the largest merchandising organizations in the world. It sells approximately $600,000,000 worth of merchandise annually to approximately 30,000,000 customers. It has three factories for the manufacture of paints, varnishes, fencing, and farm equipment; 640 department stores; 190 catalogue mail order offices, and 9 mail order houses. (The plant for the manufacture of farm equipment is also in the possession of the government because of an interruption in operation resulting from Ward's refusal to comply with a directive order of the Board.) The articles and materials sold by Ward include automobile supplies, building materials, farm machinery equipment and supplies including repair parts, heating apparatus, plumbing supplies, clothing and shoes, drugs, furniture, and hardware, home furnishings and drygoods. The

mail order customers of Ward are largely engaged in the production of agricultural commodities essential to the prosecution of the war and the maintenance of the civilian economy and live in rural areas where they are, in fact, dependent upon mail order houses, including Ward, for the purchase and receipt of many necessary articles of equipment and supplies. In addition many war workers whose shopping hours are limited as a result of their war work buy clothing and other essential goods by mail from Ward. Any disruption of the operations of Ward would dislocate huge inventories, a large working force and a distribution system that has as its customers nearly one-fourth of the population of the country. (Vinson and A. C. C. Hill Affidavits, R. 142, 144, 138; Findings, R. 720.)

Nearly all of the 130,000 items catalogued for sale by Ward have ceiling prices and some of them are rationed in behalf of the war effort (Vinson Affidavit, R. 142, 144). Ward has secured from the War Production Board numerous priorities on the ground that the maintenance of its business is essential to the war effort (Affidavits of Belsley and Gallagher, R. 32, 166). In addition, Ward has entered into war contracts for the sale of more than a million dollars' worth of goods to be shipped abroad under Lend-Lease (Mack Affidavit, R. 139).

Ward employs approximately 70,000 persons. Nearly 12,000 of these are employed in the plants

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and facilities of which the Army has taken possession under the Executive Order here involved. Many of these 12,000 employees are members of labor organizations affiliated with one or another of four international unions, two of which are affiliated with the Congress of Industrial Organizations and two with the American Federation of Labor (Complaint, R. 6, and Answer, R. 217).

Ward's entire business is managed, controlled and directed by its officers and executives from its administrative offices in Chicago. Its labor policies and decisions regarding labor disputes throughout the nation are determined and controlled by the Company, the individuals named as defendants, and other officers and agents from its principal office in Chicago, Illinois.

(4) *The adverse effect on the war effort of Ward's noncompliance with directives of the War Labor Board.*

During the past two and one-half years, 21 labor disputes, involving over 14,000 employees, between Ward and certain labor organizations have been considered by the War Labor Board.[2] The Board has issued final orders in disputes involving 12,000

[2] On April 25, 1944, the President took possession of certain Chicago properties of Ward under Executive Order No. 9438 because of the labor dispute then in existence. Legal proceedings were instituted in the Federal District Court in Chicago to test the validity of this action, but after an election to select the bargaining agent, possession was relinquished and the case, on suggestion of the Government, was dismissed as moot.

workers at properties of which possession has been taken under Executive Order No. 9508. (Davis affidavit, R. 69.)

Ward has consistently refused to abide by the directives of the Board and, since the agreement between labor and management to avoid strikes and lockouts can only be maintained by compliance with procedures for peaceful settlement, Ward's conduct threatens to destroy the entire system for the settlement of war-time labor disputes. In his affidavit in this case, James F. Byrnes, Director of the Office of War Mobilization and Reconstruction, states that the "continued refusal of Montgomery Ward & Co., Incorporated, to conform to these procedures for the adjustment of war-time labor disputes and for the maintenance of wage and price stabilization threatens to disrupt these procedures, and that the Company's conduct, if allowed to continue, will seriously interfere with the successful prosecution of the war." (R. 350.)

The affidavits of Fred M. Vinson, Director of the Office of Economic Stabilization (R. 142, 146, 147), and of William H. Davis, Chairman of the National War Labor Board (R. 69, 70), both state that Ward's policy will probably destroy the present program for the settlement of war-time labor disputes.

Strikes against Ward may rapidly spread throughout industry. The affidavit of Mr. Davis (R. 69, 76) shows that on many occasions strikes in one plant have spread throughout a community, and

other affidavits show that there was grave danger that the strike in Detroit existing at the time of the issuance of Executive Order No. 9508 would spread throughout that important war production center (Affidavits of Anhut, R. 160, Sikorski, R. 212, 213, Nelson, R. 205, Nast, R. 209, Scholle, R. 204, and McCreedy, R. 203). There is also an affidavit by the Regional Director of the C. I. O. for the region of Michigan and Northwestern Ohio stating that the failure to settle Ward's labor disputes will have an adverse effect on the referendum being taken this month among automobile workers on the question of the no-strike pledge (Affidavit of Scholle, R. 209).

Even if the strikes of Ward should not spread, any prolonged interruption of Ward's own business would adversely affect war production. Millions of essential workers obtain from the company working tools, equipment and goods essential to their well-being and, particularly, Ward supplies farm workers with agricultural tools, equipment and many other necessities. (Affidavits of Fred M. Vinson, R. 142, and A. C. C. Hill, R. 138.)

(5) *The legal proceedings.*

On December 28, 1944, shortly after taking possession of Ward's facilities hereinabove referred to (supra, p. 3), the Government instituted this action for a declaratory judgment that its action was valid and legal, and praying an injunction against interference with the Government's lawful possession.

The District Court held that the taking of possession was illegal. It held that Section 3 of the War Labor Disputes Act did not authorize such action by the Government since the Company is engaged in retail selling and distribution and therefore is not equipped for production within the meaning of that section. It held that the Act was "not an integrated piece of legislation," and it appears to have concluded that accordingly the meaning given to "production" in Section 3 need not give internal coherence to the entire statute. It seems to have held further that the President's independent constitutional power to take property in war-time existed only "within the actual theatre of military operations" and then only if the seizure is "essential for the use of the naval or military forces." Notwithstanding this conclusion, the Court seems to affirm that the taking of possession of the coal mines was a valid exercise of the President's constitutional powers. The court was silent on the contention of the government that its action here was an exercise of the combined war powers of the Congress and the Executive.

The court stressed the reluctance with which it arrived at its conclusion, stating that (R. 719) "it may well be that an interruption at this time in the flow of any goods may directly or indirectly affect our armed forces, thereby resulting in added loss of life or prolonging the war." The court entered a stay order, thus permitting the Govern-

ment to continue in possession pending appeal. (R. 728).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that the War Labor Disputes Act did not authorize the action taken by the President.

(2) In failing to hold that the War Labor Disputes Act in conjunction with the powers of the President under the Constitution authorized the action taken by the President.

(3) In holding that the Constitution, without regard to the War Labor Disputes Act, did not authorize the action taken by the President.

(4) In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANCE OF THE QUESTIONS PRESENTED

This is the first case to come before this Court involving the powers of the Government under Section 3 of the War Labor Disputes Act. It is likewise the first case in this war involving the President's comparable powers under the Constitution. It presents as well the nature of the combined war powers of the President and the Congress. It raises questions of immediate and large significance in the conduct of the war.

The President under Executive Order No. 9508 declared that "the war effort will be unduly impeded or delayed by these interruptions;" and

"that the operation of other plants and facilities essential to the war effort is threatened by the labor disturbances at the plants and facilities of Montgomery Ward & Co., Incorporated." That the company's conduct will seriously interfere with the successful prosecution of the war has been attested by the affidavits of the Director of War Mobilization, the Director of Economic Stabilization, and the Chairman of the War Labor Board.

Unless the decision of the District Court is reversed, the Government has no means under existing law of preventing the consequences apprehended by the President and these other responsible officials. The Government would stand stripped of power to deal with consequences which might develop into the most serious crisis in the history of the war outside, but connected with, the area of actual military operations in the field.

It is true that, even as interpreted by the District Court, the War Labor Disputes Act and certain other statutes give the President authority to take possession of many kinds of properties when necessary to prevent interruptions of war production by labor disputes. Nevertheless, if the decision below prevails, there are important industries not covered by the existing statutes. The Government would have no authority to prevent interruptions of those industries by labor disputes. Electric and water distribution sys-

tems are one example. Harbor and port facilities, such as wharves, and central storage and warehousing facilities are others. Under the District Court's decision, the Government lacks authority to prevent interruptions of such operations.

It is submitted that the resolution of the questions thus presented is of such immediate importance as to warrant consideration by this Court now. The case is more exigent than many others in which the Court has exercised its discretionary authority to issue a writ of certiorari prior to decision by the Circuit Court of Appeals.[3] If certiorari is not now granted there is serious question whether the case could reach this Court at the present term. Moreover, the case presents no strong countervailing reasons for postponing consideration by this Court. No questions of local law are involved. Nor does the case turn upon any substantial issue of fact. There is no significant controversy over the actual nature of respondent's business activities. Nor can there by any real dispute as to the facts which led to the exercise of the power of the President under the War Labor Disputes Act and the Constitution. And if it be assumed that the factual determinations

[3] *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330; *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Hood & Sons, Inc.* v. *United States*, 307 U. S. 588; *Ex parte Quirin*, 317 U. S. 1.

of the President are reviewable, the executive order and the affidavits contained in the record make it clear that those determinations are well founded. The essential issues, therefore, are of law: whether respondent is engaged in production within the meaning of the War Labor Disputes Act, whether the case presents a proper application of the war-time powers of the Congress and the President, and whether the President has any power under the Constitution, in the conditions of modern total war, to take possession of property outside the actual scene of military operations.

Unless the decision below is now reviewed serious uncertainty will cloud the action of the Government with respect to both the continuing possession of respondent's plants and the meeting of future emergencies elsewhere. Substantial sums are being expended and substantial liability is being risked. Every consideration of sound management calls for early removal of the uncertainties surrounding the right of possession. Beyond this, as the President and his advisors have concluded, there is serious danger that the disturbances at respondent's plants may spread, and there is evidence in the record that the failure of the Government to cope with this situation may result in the abandonment of the no-strike pledge itself, as well as in the collapse of the en-

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tire existing system of wartime control of labor disputes.

II. THE DECISION BELOW WAS ERRONEOUS

The decision below, we believe, takes an erroneously narrow view of the powers of the President under the Act and under the Constitution and of the combined powers of the President and the Congress. We shall briefly indicate the Government's position on these issues.

(1) *The Act authorizes the President's action.* Section 3 of the War Labor Disputes Act provides that the President may take immediate possession of any "plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith" upon three conditions. The President must find (1) that there is an interruption or threatened interruption of the operations of the plant, mine or facility as a result of a strike or other labor disturbance; (2) that the war effort will be unduly impeded or delayed by such interruption; and (3) that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort.

The question under this branch of the case is whether Ward is equipped for "production," since there can be no serious doubt that the properties are plants or facilities, *Manufacturers'*

Company v. *Fleet Corp.*, 264 U. S. 250, 254–255; *Briggs Mfg. Co.* v. *United States*, 30 F. (2d) 962 (D. Conn.), or that the articles or materials which it "produces" are useful in connection with the war effort.

The Government contends that Congress has used the word "production" in the War Labor Disputes Act to include all steps in the preparation, construction, assembly, maintenance, storage, repair, distribution and making available of articles or materials "which may be required for the war effort or which may be useful in connection therewith." We support this contention by reference to the legislative history of the Act and to the remainder of the statute since the word derives its meaning from the full context of the statute and must be given meaning in the light of the mischief sought to be corrected and the end to be attained. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 124, and cases cited therein.

The dominant factor in the legislative history of this Act is that it was passed at a time when the coal mines had already been taken by the President and after the President had on numerous other occasions exercised a power to take possession of plants and facilities as a means of preventing an interruption to the war effort due to labor disputes. The power that the President had exercised prior to the passage of the Act was the power to take possession of any plant or

facility that was necessary or useful in connection with the prosecution of the war if the action was required to prevent interference with the war effort or, prior to the war, with the national defense. The object of the Act was to confirm and ratify this power in the President, not to limit it. The legislative history is replete with evidence that the Congress recognized that the President had been exercising an asserted constitutional power and that Congress meant to remove any possible doubt as to the existence or validity of the exercise of that power by giving complete legislative ratification thereof. Thus Senator Connally, the author of the bill, said (89 Cong. Rec. 3807):

> There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to au-

> thorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

Senator Connally also said (89 Cong. Rec. 3885):

> My purpose in this bill is to give the President specific authority, to put the Congress squarely behind him, and to confirm and ratify in him the power to do the things which time has demonstrated must be done.

When the conference report on the bill was before the House of Representatives, Representative Harness, one of the managers for the House, described section 3 as follows: (89 Cong. Rec. 5731):

> Section 3 defines the powers of the President to take possession of property, and this is the heart of the Senate bill, with which I am sure all of you are familiar. This authority to seize extends quite comprehensively to any plant, mine, or facility which may be required for the war effort, or which may be useful in connection therewith * * *

The remaining portions of the Act require the same broad interpretation of Section 3 as that which the legislative history gives it. Thus, Section 8 requires that in order that the President may be informed of all labor disputes which

"threaten seriously to interrupt war production" the employees of any "war contractor" must take certain steps in connection with any labor dispute which may arise. The term "war contractor" is broadly defined by Section 2 of the Act, so as to cover one engaged in activities like those of Ward. In other words, for the purpose of Section 8, Ward is engaged in "production."

That the interpretation given Section 3 by the district court is in conflict with the basic plan and purpose of the statute read as a whole is further shown by Section 7. That section ratifies the executive order establishing the War Labor Board and specifically gives the Board jurisdiction over any labor disputes "which may lead to substantial interference with the war effort." This is the sole limitation on the Board's jurisdiction. Yet the Board has no power to enforce its orders, *National War Labor Board* v. *Montgomery Ward & Company,* 144 F. (2d) 528 (App. D. C.), certiorari denied November 13, 1944, No. 538, October Term, 1944; *Employers Group of Motor Freight Carriers, Inc., et al.* v. *National War Labor Board, et al.,* 143 F. (2d) 145 (App. D. C.), certiorari denied October 9, 1944, No. 350, October Term, 1944. The lower court, by holding that the President's power under Section 3 is not as broad as the jurisdiction of the Board under Section 7, has necessarily declared that there is a large number of cases over which the Board has jurisdiction but concerning which the President can take no action

at all if operations are interrupted which may lead to substantial interference with the war effort.

(2) *The Constitution authorizes the President's action.* The District Court appears to have held that while the President has an independent constitutional power to take possession of property in time of war, this power can be exercised only in the theatre of actual military operations, notwithstanding the fact that the Court seems to state that the taking of possession of the coal mines outside the theatre of military operations was valid. The Government contends that under the conditions of the present war the President's power to take possession of property, subject to constitutional requirements of just compensation, is not limited to property having a mere physical or geographical relation to the actual scene of military operations. The gravity of an emergency requiring the taking of possession of particular property in order that the prosecution of the war shall not be impeded may depend upon factors other than the location of the property.

Both the cases and our constitutional history, under conditions less urgent than those flowing from the nature of the present war, afford numerous examples of the existence of a power residing in the President to take possession of property, by virtue of his office as Commander-in-Chief of the Army and Navy and his responsibility faithfully to execute the laws. The power in conditions

of emergency is recognized in *Mitchell* v. *Harmony,* 13 How. 115; *United States* v. *Russell,* 13 Wall. 623; the *Prize Cases,* 2 Black 635; *United States* v. *Pacific Railroad,* 120 U. S. 227; *Roxford Knitting Co.* v. *Moore & Tierney,* 265 Fed. 177, 179 (C. C. A. 2); *Ken-Rad Tube & Lamp Corp.* v. *Badeau,* 55 F. Supp. 193, 197 (W. D. Ky.); and *Alpirn* v. *Huffman,* 49 F. Supp. 337, 340 (D. Neb.). The power was exercised by President Lincoln in 1861 when he took over a branch of the Baltimore & Ohio Railroad without express statutory authority and by President Roosevelt in the numerous seizures listed in the appendix prior to the passage of the War Labor Disputes Act (*infra,* p. 51).

The cases have put no limitation on the President's constitutional powers in terms of the relation of the particular property to the theatre of actual military operations. The distinction growing out of the situs of the property goes to the responsibility of the Government to make compensation; see, for example, the *Pacific Railroad* case, *supra,* p. 238. Once the obligation for compensation is recognized and the conditions of necessity with respect to the particular property are sufficiently strong, the distinction does not have controlling importance.

It is difficult to imagine how, in the circumstances of modern war, an important constitutional war power, heretofore recognized, could be limited to the actual theatre of operations. The

conduct of modern war is not itself limited by geography. As Judge Learned Hand said in upholding the seizure during World War I of the International Cable Lines under Congressional authority, "it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theatre of military operations." *Commercial Cable Co.* v. *Burleson,* 255 Fed. 99, 104 (E. D. N. Y.) (reversed on the ground that the case had become moot by the time it reached the Supreme Court, 250 U. S. 360); see also *United States* v. *City of Chester* 144 F. (2d) 415 (C. C. A. 3).

(3) *The taking is valid as an exercise of the combined war powers of the President and the Congress.* While the Executive Order and the action taken pursuant thereto were authorized, in the view of the Government, under the Congressional power, or under the Constitutional power, they are also valid as an exercise of the combined war powers of the Congress and the President.

In Section 6 of the Act the Congress has imposed criminal penalties for interference by strike, lockout, or otherwise with the operation of "any plant, mine or facility * * * in the possession of the United States," without specific limitation to those taken under Section 3. This provision was enacted into law while the Government was in possession of the coal mines under Presidential authority alone. Congress thus ap-

proved the Presidential action based on prevention of interruptions to the war effort and combined its own war powers with those of the Executive to establish the authority to permit possession and operation by the Government of facilities the uninterrupted operation of which was deemed essential to the prosecution of the war. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81, 91, 92; *Korematsu* v. *United States,* No. 22, decided December 18, 1944. The standards for the exercise of this combined power are not limited by the description of facilities contained in Section 3, even if the district court's construction of that section were correct.

The Government's contention that the taking was valid, whether under the statute or the Constitution or under the combined war powers of the Congress and the Executive, is fortified further by the fact that Congress has acquiesced in the legal authority of the President to take possession of the plants and facilities of Ward itself. In April 1944 the President by Executive Order No. 9438 directed the Secretary of Commerce to take possession of the plants and facilities of Ward in Chicago. Committees of both houses of Congress investigated that seizure and in the hearings before the House Committee both the Attorney General and the Chairman of the National War Labor Board urged the Congress to change the Act if it disagreed with the interpretation

given the statute by the President.[4] A majority of the House Committee concluded that the taking of the properties of Ward was authorized by the statute while a majority of the Senate Committee came to the opposite conclusion.[5] The House Committee specifically urged that all who disagreed with its conclusions should offer amendments to the Act. As a result of the previous seizure and its consideration by Congress four separate measures were proposed in the House of Representatives for the purpose of restricting the powers of the President. In the seven months which intervened prior to the action here involved the Congress took no action on any of these bills.[6]

(4) *The President's findings are valid.* If the President has authority as a matter of law to take possession of the properties of Ward either under the Act or the Constitution, or the two together, the sole remaining question is whether

[4] Hearings before the Select Committee of the House to investigate seizure of Montgomery Ward & Co., 78th Congress, 2d Sess., pp. 10, 53, 132.

[5] H. Rep. No. 1904, 78th Cong., 2d Sess.; Rept. of the Senate Subcommittee of the Committee on the Judiciary on Executive Order 9438, 78th Cong., 2d Sess.

[6] The bills, the sponsors of the bills, the dates of their introduction, and the points at which they appear in the Congressional Record are as follows: H. R. 4716, Representative Hoffman, May 1, 1944, 90 Cong. Rec. 3805; H. Con. Res. 83, Representative Crawford, May 4, 1944, 90 Cong. Rec. 4039; H. R. 4758, Representative Compton, May 5, 1944, 90 Cong. Rec. 4088; H. R. 4769, Representative Gathings, May 8, 1944, 90 Cong. Rec. 4168.

the particular facts justify the President's exercise of that authority on this occasion. Under the statute he may take possession "whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort * * *." It is assumed by the Government that the conditions thus required are at least as extensive as those which would create an "emergency" sufficient to justify the exercise of the President's constitutional power.

In Executive Order No. 9508 the President specifically did find and proclaim, after investigation, the existence of all three of these conditions. If the Court deems these determinations of the President reviewable, it need only be pointed out that the findings of the President are supported not only by his own informed judgment but also by the affidavits of the Director of War Mobilization, the Director of the Office of Economic Stabilization, the Under Secretary of War, the Under Secretary of the Navy, and the Chairman of the War Labor Board.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1945.

APPENDIX

WAR LABOR DISPUTES ACT (ACT OF JUNE 25, 1943, 57 STAT. 163, 50 U. S. C. APP. (SUPP. III), SECS. 1501–1511).

AN ACT, Relating to the use and operation by the United States of certain plants, mines, and facilities in the prosecution of the war, and preventing strikes, lock-outs, and stoppages of production, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "War Labor Disputes Act."

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "person" means an individual, partnership, association, corporation, business trust, or any organized group of persons.

(b) The term "war contract" means—

(1) a contract with the United States entered into on behalf of the United States by an officer or employee of the Department of War, the Department of the Navy, or the United States Maritime Commission;

(2) a contract with the United States entered into by the United States pursuant to an Act entitled "An Act to promote the defense of the United States";

(3) a contract, whether or not with the United States, for the production, manufacture, construction, reconstruction, installation, maintenance, storage, repair, mining, or transportation of—

(A) any weapon, munition, aircraft, vessel, or boat;

(B) any building, structure or facility;

(C) any machinery, tool, material, supply, article, or commodity; or

(D) any component material or part of or equipment for any article described in subparagraph (A), (B), or (C);

the production, manufacture, construction, reconstruction, installation, maintenance, storage, repair, mining, or transportation of which by the contractor in question is found by the President as being contracted for in the prosecution of the war.

(c) The term "war contractor" means the person producing, manufacturing, constructing, reconstructing, installing, maintaining, storing, repairing, mining, or transporting under a war contract or a person whose plant, mine, or facility is equipped for the manufacture, production, or mining of any articles or materials which may be required in the prosecution of the war or which may be useful in connection therewith; but such term shall not include a carrier, as defined in title I of the Railway Labor Act, or a carrier by air subject to title II of such Act.

(d) The terms "employer", "employee", "representative", "labor organization", and "labor

dispute" shall have the same meaning as in section 2 of the National Labor Relations Act.

POWER OF PRESIDENT TO TAKE POSSESSION OF PLANTS

SEC. 3. Section 9 of the Selective Training and Service Act of 1940 is hereby amended by adding at the end thereof the following new paragraph:

"The power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith. Such power and authority may be exercised by the President through such department or agency of the Government as he may designate, and may be exercised with respect to any such plant, mine, or facility whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort: *Provided,* That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, lock-out, threatened strike, threatened

lock-out, work stoppage, or other cause, such plant, mine, or facility shall be returned to the owners thereof as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking of possession thereof: *Provided further,* That possession of any plant, mine, or facility shall not be taken under authority of this section after the termination of hostilities in the present war, as proclaimed by the President, or after the termination of the War Labor Disputes Act; and the authority to operate any such plant, mine, or facility under the provisions of this section shall terminate at the end of six months after the termination of such hostilities as so proclaimed."

TERMS OF EMPLOYMENT AT GOVERNMENT-OPERATED PLANTS

SEC. 4. Except as provided in section 5 hereof, in any case in which possession of any plant, mine, or facility has been or shall be hereafter taken under the authority granted by section 9 of the Selective Training and Service Act of 1940, as amended, such plant, mine, or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine, or facility was so taken.

APPLICATION TO WAR LABOR BOARD FOR CHANGE IN TERMS OF EMPLOYMENT AT GOVERNMENT-OPERATED PLANTS

SEC. 5. When possession of any plant, mine, or facility has been or shall be hereafter taken under

authority of section 9 of the Selective Training and Service Act of 1940, as amended, the Government agency operating such plant, mine, or facility, or a majority of the employees of such plant, mine, or facility or their representatives, may apply to the National War Labor Board for a change in wages or other terms or conditions of employment in such plant, mine, or facility. Upon receipt of any such application, and after such hearings and investigations as it deems necessary, such Board may order any changes in such wages, or other terms and conditions, which it deems to be fair and reasonable and not in conflict with any Act of Congress or any Executive order issued thereunder. Any such order of the Board shall, upon approval by the President, be complied with by the Government agency operating such plant, mine, or facility.

INTERFERENCE WITH GOVERNMENT OPERATION OF PLANTS

SEC. 6 (a) Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lockout, strike, slow-down, or other interruption interefering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be

deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

(b) Any person who willfully violates any provision of this section shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both.

FUNCTIONS AND DUTIES OF THE NATIONAL WAR LABOR BOARD

SEC. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Number 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substan-

tial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

(3) To require the attendance of witnesses and the production of such papers, documents, and records as may be material to its investigation of facts in any labor dispute, and to issue subpenas requiring such attendance or production.

(4) To apply to any Federal district court for an order requiring any person within its jurisdiction to obey a subpena issued by the

Board; and jurisdiction is hereby conferred on any such court to issue such an order.

(b) The Board, by its Chairman, shall have power to issue subpenas requiring the attendance and testimony of witnesses, and the production of any books, papers, records, or other documents, material to any inquiry or hearing before the Board or any designated member or agent thereof. Such subpenas shall be enforceable in the same manner, and subject to the same penalties, as subpenas issued by the President under title III of the Second War Powers Act, approved March 27, 1942.

(c) No member of the Board shall be permitted to participate in any decision in which such member has a direct interest as an officer, employee, or representative of either party to the dispute.

(d) Subsections (a) (1) and (2) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(e) The Board shall not have any powers under this section with respect to any matter within the purview of the Railway Labor Act, as amended.

NOTICE OF THREATENED INTERRUPTIONS IN WAR PRODUCTION, ETC.

SEC. 8. (a) In order that the President may be apprised of labor disputes which threaten seriously to interrupt war production, and in order that employees may have an opportunity to express themselves, free from restraint or coercion, as to whether they will permit such interruptions in wartime—

(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

(2) For not less than thirty days after any notice under paragraph (1) is given, the contractor and his employees shall continue production under all the conditions which prevailed when such dispute arose, except as they may be modified by mutual agreement or by decision of the National War Labor Board.

(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit, or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production. The National Labor Relations Board shall include on the ballot a concise statement of the major issues involved in the dispute and of the efforts being made and the facilities being utilized for the settlement of such dispute. The National Labor Relations Board shall by order forthwith certify the results of such balloting, and such results shall be open to public inspection. The National Labor Rela-

tions Board may provide for preparing such ballot and distributing it to the employees at any time after such notice has been given.

(b) Subsection (a) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(c) Any person who is under a duty to perform any act required under subsection (a) and who willfully fails or refuses to perform such act shall be liable for damages resulting from such failure or refusal to any person injured thereby and to the United States if so injured. The district courts of the United States shall have jurisdiction to hear and determine any proceedings instituted pursuant to this subsection in the same manner and to the same extent as in the case of proceedings instituted under section 24 (14) of the Judicial Code.

POLITICAL CONTRIBUTIONS BY LABOR ORGANIZATIONS

SEC. 9. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251), is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political officer, or for any corporation whatever, or any labor organization to make a contribution in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or for any candidate, political committee, or other per-

son to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' shall have the same meaning as under the National Labor Relations Act."

TERMINATION OF ACT

SEC. 10. Except as to offenses committed prior to such date, the provisions of this Act and the amendments made by this Act shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President, or upon the date (prior to the date of such proclamation) of the passage of a concurrent resolution of the two Houses of Congress stating that such provisions and amendments shall cease to be effective.

SEPARABILITY

SEC. 11. If any provision of this Act or of any amendment made by this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the Act and of such amendments, and the application of such provision to other persons or circumstances, shall not be affected thereby.

EXECUTIVE ORDER 9508.

AUTHORIZING THE SECRETARY OF WAR TO TAKE POSSESSION OF AND TO OPERATE CERTAIN PLANTS AND FACILITIES OF MONTGOMERY WARD & CO., INCORPORATED.

WHEREAS the National War Labor Board has found and reported to me that labor disturbances involving nearly 12,000 workers now exist in the plants and facilities of Montgomery Ward & Co., Incorporated, in Jamaica, New York; Detroit, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California; and Portland, Oregon; that in the exercise of the authority conferred upon it by the War Labor Disputes Act, the National War Labor Board has issued directive orders deciding the labor disputes that gave rise to the said disturbances; that the said directive orders provide terms and conditions, of a kind customarily included in collective bargaining agreements, to govern the relations between the parties to such disputes; that the terms and conditions provided for by the said directive orders are fair and equitable to employer and employee under all the circumstances of the cases; that Montgomery Ward & Co., Incorporated, has refused to put into effect the terms and conditions contained in these directive orders; that as a result of the refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in the directive orders issued by the National War Labor Board in the dispute in the plants and facilities of Montgomery Ward & Co., Incorporated, in De-

troit, Michigan, a serious strike involving approximately 1,800 employees is now in progress in that city; that there is a present danger that the strike now existing in the plants and facilities of Montgomery Ward & Co., Incorporated, in Detroit, Michigan, will spread to plants and facilities of Montgomery Ward & Co., Incorporated, located in other cities and will adversely affect the operation of other plants and facilities, located in the Detroit area and elsewhere, that are engaged in the production of materials used in the prosecution of the war; and

WHEREAS the National War Labor Board has also found and reported to me that Montgomery Ward & Co., Incorporated, employs approximately 70,000 workers, and serves approximately 30 million customers; that an interruption of the Company's activities would unduly delay and impede the war effort; that the preservation of the war-time structure of labor relations and the prevention of interruptions of war production depend upon the peaceful settlement of labor disputes by the National War Labor Board in the manner provided for by the Congress; that the preservation of the national stabilization program requires peaceful settlement of wage disputes during the war by the procedure provided for by the Congress; that the persistent refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in directive orders issued by the National War Labor Board, pursuant to the War Labor Disputes Act, threatens to destroy both the war-time structure of labor relations and the procedure established by the Congress for the peaceful settlement of wage dis-

putes during the war, and unduly impedes and delays the war effort; and

WHEREAS after investigation I find and proclaim that the plants and facilities of Montgomery Ward & Co., Incorporated, located in Jamaica, New York; Detroit, Dearborn and Royal Oak, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California; and Portland, Oregon, are plants and facilities that are equipped for the production of articles or materials which may be required for the war effort or which may be useful in connection therewith, within the meaning of the War Labor Disputes Act; that Montgomery Ward & Co., Incorporated, is engaged in the distribution of articles and materials that are essential to the maintenance of the war economy; that as a result of labor disturbances there are existing and threatened interruptions of the operations of the said plants and facilities of Montgomery Ward & Co., Incorporated; that the war effort will be unduly impeded or delayed by these interruptions; that the operation of other plants and facilities essential to the war effort is threatened by the labor disturbances at the plants and facilities of Montgomery Ward & Co., Incorporated; and that the exercise as hereinafter specified of the powers and authority vested in me is necessary to insure, in the interest of the war effort, the operation of these plants and facilities, and of other plants and facilities that are threatened to be affected by the said labor disturbances; and

WHEREAS, after investigation I also find and proclaim that these existing and threatened interruptions result from the failure of Montgomery

Ward & Co., Incorporated, to adjust labor disputes of long standing with respect to the terms and conditions of employment at the Company's plants and facilities; that the National War Labor Board has considered these disputes and issued directive orders determining and providing methods for their adjustment; that the labor unions involved have expressed their willingness to adjust the disputes in accordance with the directive orders of the National War Labor Board, but Montgomery Ward & Co., Incorporated, has persistently refused to accept the provisions of the directive orders as a basis for the adjustment of such disputes; and that this refusal unduly impedes and delays the successful prosecution of the war;

Now, THEREFORE, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the War Labor Disputes Act (57 Stat. 163) and section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892) as amended by the War Labor Disputes Act, as President of the United States and Commander in Chief of the Army and Navy of the United States, it is hereby ordered as follows:

1. The Secretary of War is hereby authorized and directed, through and with the aid of any persons or instrumentalities that he may designate, to take possession of the plants and facilities of Montgomery Ward & Co., Incorporated, that are located in Jamaica, New York; Detroit, Dearborn and Royal Oak, Michigan; Chicago, Illinois; St. Paul, Minnesota; Denver, Colorado; San Rafael, California; and Portland, Oregon, and

any real or personal property or other assets used or useful in connection with the operation of such plants and facilities, and to operate or to arrange for the operation of such plants and facilities in any manner that he deems essential for the successful prosecution of the war. The Secretary of War is also authorized to exercise any contractual or other rights of Montgomery Ward & Co., Incorporated; to continue the employment of, or to employ, any person; to do any other thing that he may deem necessary for the operation of the said plants and facilities, including the production, sale, and distribution of the articles and materials customarily produced in or sold or distributed from the said plants and facilities; and to take any other steps that he deems necessary to carry out the provisions and purposes of this order.

2. The Secretary of War shall operate the said plants and facilities under the terms and conditions of employment that are in effect at the time possession of the said plants and facilities is taken, and during his operation of the plants and facilities shall observe the terms and conditions of the directive orders of the National War Labor Board, including those dated June 6 and 16, 1944, and December 14 and 15, 1944, provided that the Secretary of War is authorized to pay the wage increases specified in said directive orders, from the effective dates specified in said directive orders to the date possession of said plants and facilities is taken under this order, only out of the net operating income of said plants and facilities during the period of their operation by the Secretary of War. In the event that it appears to the Sec-

retary of War that the net operating income of said plants and facilities will be insufficient to pay the aforesaid accrued wage increases, the Secretary shall make a report to the President with respect thereto.

3. All federal agencies, including, but not limited to, the War Manpower Commission, the National Selective Service, the Department of Justice, and the Reconstruction Finance Corporation, are directed to cooperate with the Secretary of War to the fullest extent possible in carrying out the purposes of this order. The Secretary of War may request other federal agencies, including those mentioned above, to assign personnel to assist him in the performance of his duties hereunder.

4. Possession, control, and operation of any plant or facility, taken under this order shall be terminated by the Secretary of War within sixty days after he determines that the productive efficiency of the plant or facility prevailing prior to the existing and threatened interruptions of operations, referred to in the recitals of this order, has been restored.

5. The words "plants and facilities of Montgomery Ward & Co., Incorporated", whenever used in this order, shall be deemed to include, without limitation, any mail order house, warehouse, office, retail store, factory, or production or assembly unit, owned or operated by Montgomery Ward & Co., Incorporated, in the areas specified in this order.

FRANKLIN D. ROOSEVELT.

The WHITE HOUSE,
December 27, 1944.

SECTION 9 OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940. 54 STAT. 892 (50 U. S. C. APP. 309).

The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the

Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufac-

turing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

EXECUTIVE ORDER 9017.

ESTABLISHMENT OF THE NATIONAL WAR LABOR BOARD.

WHEREAS by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941 and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and

WHEREAS as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special com-

missioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

2. This Order does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted.

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after

consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

4. The Board shall have power to promulgate rules and regulations appropriate for the performance of its duties.

5. The members of the Board (including alternates) shall receive necessary traveling expenses, and, unless their compensation is otherwise prescribed by the President, shall receive in addition to traveling expenses $25.00 per diem for subsistence expense on such days as they are actually engaged in the performance of duties pursuant to this Order. The Board is authorized to appoint and fix the compensation of its officers, examiners, mediators, umpires, and arbitrators; and the Chairman is authorized to appoint and fix the compensation of other necessary employees of the Board. The Board shall avail itself, insofar as practicable, of the services and facilities of the Office for Emergency Management and of other departments and agencies of the Government.

6. Upon the appointment of the Board and the designation of its Chairman, the National Defense Mediation Board established by Executive Order No. 8716[1] of March 19, 1941, shall cease to exist. All employees of the National Defense Mediation Board shall be transferred to the Board without acquiring by such transfer any change in grade or civil service status. All records, papers, and

[1] 6 F. R. 1532.

property, and all unexpended funds and appropriations for the use and maintenance of the National Defense Mediation Board shall be transferred to the Board. All duties with respect to cases certified to the National Defense Mediation Board shall be assumed by the Board for discharge under the provisions of this Order.

7. Nothing herein shall be construed as superseding or in conflict with the provisions of the Railway Labor Act (Act of May 20, 1926, as amended, 44 Stat. 577; 48 Stat. 926, 1185; 49 Stat. 1169; 45 U. S. Code 151), the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 457; 29 U. S. Code 151 *et seq.*), the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. Code 201 *et seq.*), and the Act to provide conditions for the purchase of supplies, etc., approved June 30, 1936 (49 Stat. 2036; 41 U. S. Code, sections 35–45), or the Act amending the Act of March 3, 1931, relating to the rate of wages for laborers and mechanics, approved August 30, 1935 (49 Stat. 1011; 40 U. S. Code, section 276 *et seq.*).

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
January 12, 1942.

List of plants and facilities taken by President Roosevelt prior to the passage of the War Labor Disputes Act.

Executive Orders	Date	Concerns Involved
Executive Order No. 8773	June 9, 1941	The North American Aviation Plant.
Executive Order No. 8866	August 22, 1941	Federal Shipbuilding & Drydock Co.
Executive Order No. 8928	October 30, 1941	Air Associates, Inc.
Executive Order No. 9141	April 18, 1942	Brewster Aeronautical Corporation
Executive Order No. 9220	August 13, 1942	General Cable Company
Executive Order No. 9225	August 19, 1942	S. A. Woods Machine Company
Executive Order No. 9254	October 12, 1942	Triumph Explosives, Inc.
Executive Order No. 9340	May 1, 1943	Coal Mines
Executive Order No. 9351	June 14, 1943	Howarth Pivoted Bearings Company

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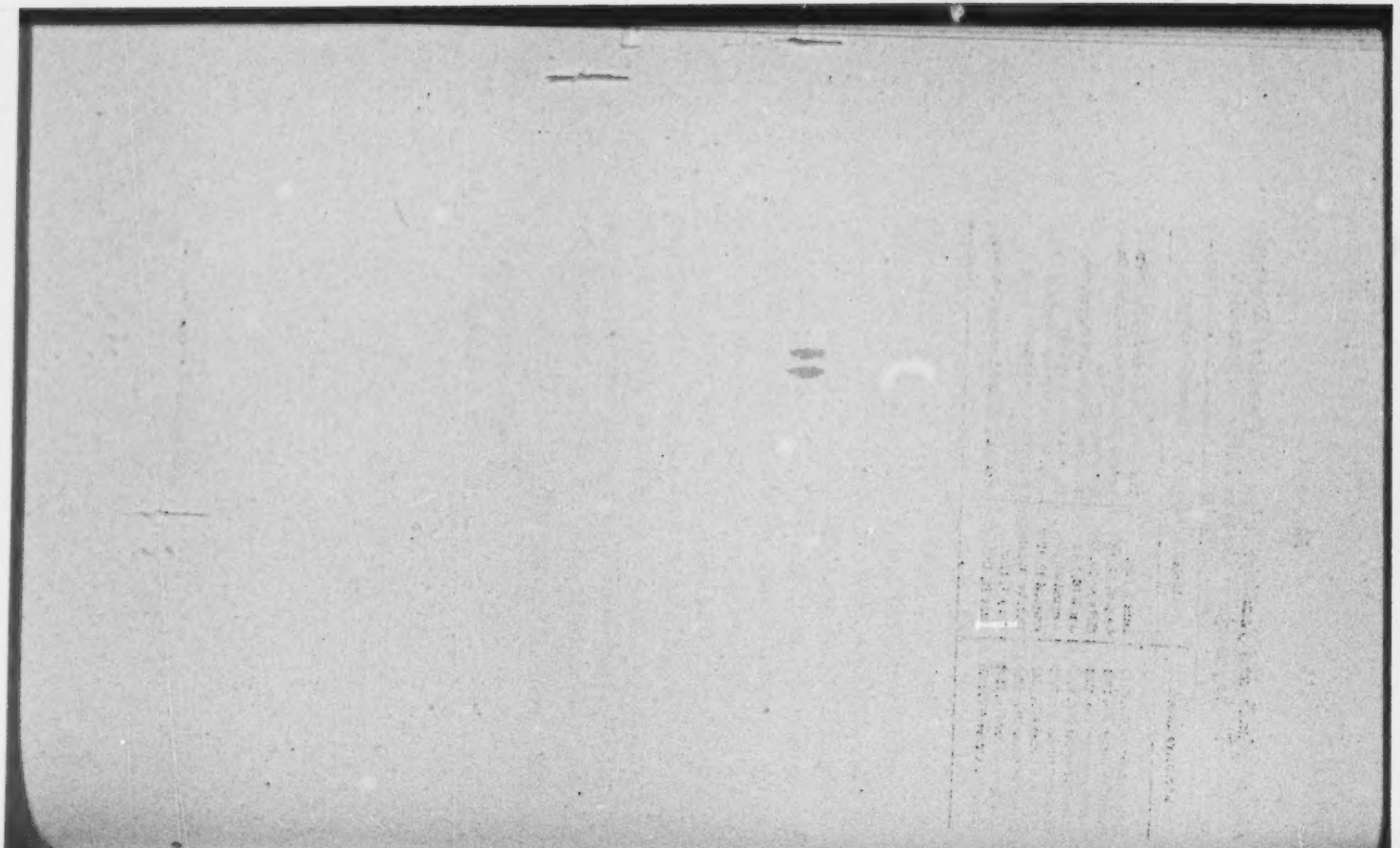

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 949

UNITED STATES,

Petitioner,

vs.

MONTGOMERY WARD & COMPANY, ET AL.

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

STUART S. BALL,
JOHN A. BARR,
HAROLD A. SMITH,
GUY A. GLADSON,
ARTHUR D. WELTON,
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For Respondents.

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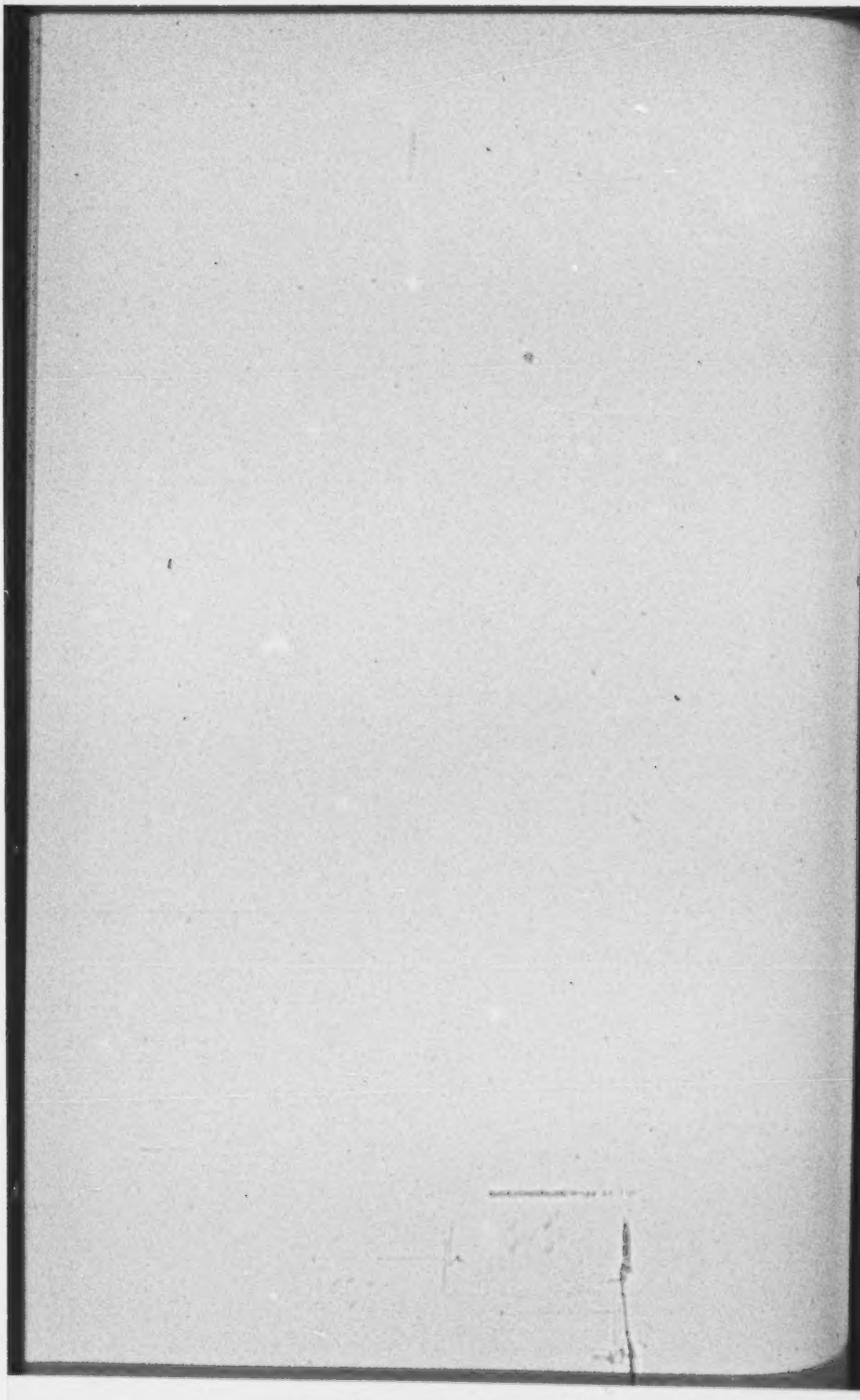

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNITED STATES,

Petitioner,

vs.

MONTGOMERY WARD & COMPANY, ET AL.

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

The District Court held that the seizure by the Army, acting under an executive order of the President, of certain retail properties of Montgomery Ward & Co. was neither authorized by the War Labor Disputes Act nor within the constitutional powers of the President as Commander in Chief of the Army and Navy (R. 719, 725).

The Respondents submit that the judgment of the District Court is clearly right. An analysis of the Government's position and of the reasons advanced in the executive order as a justification for the seizure, together with a correction of inaccuracies and omissions in the Petition for Certiorari, is necessary to a clear understanding of the question at bar.

I. The Petition Misstates the Issues When It Implies That the Decision Below Strips From "The Government" the Power to Deal With War Time Labor Disputes.

The denial by the District Court of the validity of the President's order of seizure is in no sense a challenge to the "war power" of the United States. Unquestionably the Government possesses whatever power may be necessary to wage war successfully. The question in this case is not whether the power of seizure may be within the scope of the "war power", but whether the power of seizure was in this instance invoked in the manner set forth in the constitution.

The President of the United States and "the Government" are not synonymous terms. The duty of the President is to exercise command of the armed forces of the nation and to execute the laws which Congress has enacted to aid in the prosecution of the war. Except for his authority as a military leader, the Congress must first legislate before the President can act. It is Congress which must decide the extent to which the President may wield the "war power" inherent in the sovereign United States.

The questions in the present case are whether Congress authorized, as a war measure, the seizure of the retail properties of Montgomery Ward & Co., or whether the President's power as a military leader entitled him to order the seizure of those properties without awaiting the passage of a law by Congress.

The petition for certiorari makes the somewhat emotional and altogether incorrect statement that

> "unless the decision of the District Court is reversed the Government * * * would stand stripped of power to deal with consequences which might develop into the most serious crisis in the history of the war * * *." (Petition, p. 13.)

Since the opinion below expressly affirms (R. 712) the constitutional power of the Government to order the settlement of war time labor disputes and to take such steps as the seizure of property to enforce industrial peace, "the Government" has in no sense been stripped of its power to deal with any crisis that may arise.

The Petition further asserts (p. 15) that an essential issue in the case is "whether the case presents a proper application of the war time powers of the Congress *and* President." Only war time powers of the President acting alone are in issue; those of the Congress are not questioned.

The position of the Respondents and of the District Court is simply this: First, Congress has never authorized the seizure of Wards' retail properties. Second, the President as Commander in Chief has no inherent military authority to seize private property not even remotely connected with actual warfare, not devoted to the production of implements of war, and not needed or taken for the purpose of supplying any want of the armed forces of which he is the constitutional leader.

II. The Petition Omits or Misstates Many Important Facts.

While mentioning (p. 6) that Wards owns three factories, the Petition omits to point out that none of them were covered directly or indirectly by the order of seizure (R. 341-343).

While asserting (p. 9) that "Ward has consistently refused to abide by the directives" of the War Labor Board, the Petition omits to point out that Wards' refusal has been based upon its belief that the Board in issuing those directives violated the War Labor Disputes Act, and that Ward filed suit in the District Court of the District of

Columbia to establish the illegality of those orders (R. 305-306, 308-309, 311, 312).

While asserting (p. 14) that the question of the President's power is of "immediate importance", the Petition omits to state that non-compliance with Board orders was announced by Wards when it filed its suit against the War Labor Board on October 5, 1943 (R. 305), more than a year before the order of seizure was issued. The order of seizure was not the result of any sudden or unanticipated emergency.

The facts referred to in the Petition must be read with the following points in mind:

The seizure of Wards' property was not a requisition by the President for the purpose of supplying the armed forces of the United States with any materials.

The seizure was not an impressment of Wards' properties or business for the actual use of the United States in the conduct of the war or for the purpose of equipping the armed forces either at home or abroad.

No claim is made that the President acted under any of the statutes authorizing requisition of necessary supplies or the condemnation of property for public use except insofar as reliance is placed on Section 3 of the War Labor Disputes Act.

No claim is made that Wards has ever refused to sell to the Government any article which Wards had available, or that Wards has ever refused the use of its properties for military purposes.

No claim is made that any of the seized properties are equipped or engaged in manufacturing anything.

No showing was made that any labor dispute or disturbance in any of the seized properties has resulted in a failure to deliver goods to the United States or to any

contractor engaged in the production of any article or material for the United States.

No showing was made that the seizure was necessary for, or a part of, any military campaign or operation. The Executive Order does not recite nor purport to find that the seizure was necessary for military purposes. No attempt was made to show even a remote connection with any operation of the armed forces.

None of the affidavits, not even those of Messrs. Byrnes, Vinson, Davis, Patterson or Bard, establish any sudden military emergency that called for the action of the President before he had an opportunity to seek the necessary grant of power from Congress.

Finally, no claim is made that Wards has violated any law in handling its labor disputes or in refusing to adopt the directives of the War Labor Board.

The Petition and the petitioner's affidavits demonstrate conclusively that the real reason for the seizure was the unwillingness of Wards to abide by directives of the War Labor Board which Wards believed to be illegal. Since War Labor Board directives are, as the District Court pointed out, "admittedly only advisory" (R. 720), Wards stands before this Court deprived of its properties and ousted from its business by force because it refused to accept "advice" which it regarded as improper and as an infringement of its rights.

III. The Only Possible Question of Statutory Construction Is Whether the Retail Properties of Montgomery Ward Were Equipped for "Manufacture, Production or Mining" of War Materials and Hence Subject to Seizure Under Section 3 of the War Labor Disputes Act.

The grant of power of summary seizure of private property must be found, even in time of war, in clear and explicit language:

> "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizens than was clearly and unmistakably indicated by the language they used." *Ex parte Mitsuye Endo* (Dec. 18, 1944) ..... U. S. ....., 65 Sup. Ct. (Adv. sheets) 208 at p. 217.

The Petition half-heartedly contends (pp. 16-20) that even retail establishments are plants "equipped for the manufacture, production or mining of articles or materials" necessary to or useful in the war effort, and thus subject to seizure under Section 3. The Petition contends (p. 17) that Congress used the word "production" in that section to include "all steps in the preparation, construction, assembly, maintenance, storage, repair, distribution, and making available of articles or materials."

If "production" includes every step in making available any articles which may be useful in supporting the civilian economy in time of war, then "production" includes practically the sum total of economic activities. If this definition is correct, Congress has authorized the seizure not only of factories and mines, but of corner grocery stores, neighborhood drug stores, garages, filling stations, and meat markets. Every one of those businesses would be a plant equipped for "production" under the definition of that word which the Petition advances.

Congress obviously did not intend to make such an inclusive grant of power. The word "production" is not given any "artificial definition" in the War Labor Disputes Act which would enlarge its meaning beyond that accorded it in ordinary speech (cf. *Western Union Telegraph Company* v. *Lenroot*, Jan. 8, 1945, ... U. S. ....., 65 Sup. Ct. (adv. sheets) 335, 342). The context shows that the word is not used in some special economic sense. The Congress, therefore, must have intended the word to be given its ordinary meaning.

The dictionaries define "production" as the "act or process of producing", and define the verb "to produce" as "to give being or form to; to manufacture; make,": Webster's *New International Dictionary*, 2nd Edition, Unabridged. In the absence of some artificial statutory definition the cases uniformly regard the "production" of articles and materials as the bringing of those articles and materials into existence. "Production connotes the creation of something": *Kieckhefer Container Co.* v. *Unemployment Comp. Co.*, 125 N. J. L. 52, 13 Atl. (2d) 646, 648. (cf. *Quigg* v. *State*, 145 Fla. 431, 199 So. 489, 490; *United States* v. *Elm Springs Farm*, 38 F. Supp. 508, 510-511). This is especially true when the word is used, as it is in the present statute, in close association with such a word as "manufacture": *Thurman* v. *Swisshelm* (C. C. A. 7th) 36 Fed. (2d) 350. A mere retailer is clearly excluded from a statute applying to "manufacturers or producers": *U. S.* v. *Gamble-Skogmo*, (C. C. A. 8th) 91 Fed. (2d) 372.

Since the word "production" in the context of Section 3 is unambiguous, well settled rules of statutory construction preclude resort to Congressional debates or other extrinsic matters to change the meaning of the word: *Dewey* v. *United States*, 178 U. S. 510, 521. But even if

the legislative history were admissible it would emphasize the limited sense in which Congress used the word "production".

Section 3 is simply an amendment of Section 9 of the Selective Training and Service Act, clarifying the power there granted to seize manufacturing plants producing vitally necessary war materials. The President, ostensibly exercising the powers vested in him by Section 9, had (as the table on page 51 of the Petition shows) seized certain properties, every one of which, including the coal mines, was engaged in the *bringing into existence* of materials required for the war effort. The Congressional debates show that Section 3 was intended primarily to remove any doubt as to the statutory validity of these prior seizures (89 Cong. Rec. 3774, 3879) and was intended to apply to plants engaged in the "production of munitions or supplies for the armed forces" (89 Cong. Rec. 3943, 5720). This history is conclusive proof (if any were needed) that Congress never intended Section 3 to authorize the seizure of retail stores.

The Petition seeks to distort the word "production" in Section 3 by attempting to find in Sections 7 and 8 of the Act evidences of a Congressional intention to use the word in other than its ordinary meaning.

Section 8 relates to labor disputes in the plants of "war contractors". The term "war contractor" is expressly given an artificial definition in Section 2 to include those whose plants are "equipped for manufacture, production or mining" even though they have no war contracts. The fact that Sections 8 and 2 have a separate legislative origin from Section 3, and are not *in pari materia*, rebuts any assumption that the implications relating from this specific and artificial definition of "war contractor" necessitates giving an equally artificial definition to the word "produc-

tion" in Section 3 when such an artificial definition is not expressly provided by the statute.

Nor can any weight be given the argument that Section 3 is intended to complement Section 7 by granting a power of seizure as extensive of the jurisdiction of the National War Labor Board. Congress removed from Section 7 all means of enforcing War Labor Board orders judicially, at the express request of the Chairman of the War Labor Board who wanted Board orders to remain "mere declarations of the equities of each industrial dispute * * * without specific legal sanctions": 89 Cong. Rec. 5812. Section 3 was certainly not intended to supply sanctions for Section 7; and hence the two sections are obviously not co-extensive.

The seizure of Wards' retail properties was clearly unauthorized by Section 3 of the War Labor Disputes Act.

IV. The President Had No Inherent Constitutional Power as a Military Commander to Order the Seizure of Wards' Retail Properties.

Under the Constitution different aspects of the war power are specifically conferred upon the Congress and the President. These powers and the relations of the two branches of Government, one to the other, are succinctly summarized in *Ex parte Quirin*, 317 U. S. 1, 25, 26:

> "Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to 'provide for the common Defence,' Art. I, Sec. 8, cl. 1; 'To raise and support Armies,' 'To provide and maintain a Navy,' Art. I, Sec. 8, cls. 12, 13; and 'To make Rules for the Government and Regulation of the land and naval Forces,' Art. I, Sec. 8, cl. 11; and 'To define and punish Piracies and Felonies committed on the high seas, and Offenses against

the Law of Nations,' Art. I, Sec. 8, cl. 10. And finally the Constitution authorizes Congress 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.' Art. I, Sec. 8, cl. 18.

"The Constitution confers on the President the 'executive Power,' Art. II, Sec. 1, cl. 1, and imposes on him the duty to 'take Care that the Laws be faithfully executed.' Art. II, Sec. 3. It makes him the Commander in Chief of the Army and Navy, Art. II, Sec. 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, Sec. 3, cl. 1.

"The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."

The Petition, as already noted, fails to distinguish between the total "war powers" of the Government and the specific powers conferred upon the President. The Petition seeks, by vague references to the "conditions of modern total war" (p. 15) and to the "circumstances of modern war" (p. 22) to advance a theory which this court has more than once rejected:

"The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this

position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. * * * Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

Ex parte Milligan, 4 Wall. 2, 124; repeated in *Sterling* v. *Constantin*, 287 U. S. 378, 402.

The power of the President as Commander in Chief is strictly military in character and may be used only to do such acts as are required by imperative military necessity: *Fleming* v. *Page*, 9 Howard, 50 U. S. 603, 614.

In the course of actual military operations the President or his subordinate officers may impress private property for the use of the armed forces (*U. S.* v. *Russell*, 13 Wall. 623); or destroy or jettison private property to hinder the advance of the enemy (*U. S.* v. *Pacific Railroad*, 120 U. S. 227); or seize private property to prevent it from falling into the hands of the enemy (*Mitchell* v. *Harmony*, 14 How. 115); or seize enemy property in the course of a blockade (*Prize Cases*, 2 *Black*, 635).

The powers of the President or of subordinate military commanders, however, have been carefully circumscribed by this Court:

"But we are clearly of the opinion that in all these

cases the danger must be immediate and impending, or the necessity urgent for the public service such as will not admit a delay and where the action of a civil authority would be too late in providing the means which the occasion calls for. * * * It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified."

Mitchell v. *Harmony*, 13 How. 115, 134.

"The public danger must be immediate, imminent, and impending and the emergency in the public service must be extreme and imperative and such as will not admit a delay or resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of the extreme power in respect to the particular property so impressed, appropriated or destroyed."

U S. v. *Russell*, 13 Wall. 623 at page 628.

Summarizing, the power of military action without prior legislative authority can only exist in the face of an immediate emergency of such urgency that resort cannot be had to the legislature or to the courts. The action taken must be directly related to the military necessity. The President and his subordinates can act only when the emergency is "immediate, imminent, and impending" and where it appears that neither the Congress nor the Courts would have any reasonable opportunity to supply a remedy. These elements are totally lacking in the present case. No showing of imminent necessity for the seizure has been made nor does any exist.

No showing has been made that any emergency has so suddenly arisen that resort to Congress or to the courts would not be sufficient. To the contrary the record expressly shows that Wards' non-compliance with War Labor Board orders had continued for more than a year prior to the seizure of its properties During this time the Congress has been almost continuously in session. The

very fact that this suit could be brought in the courts of the United States is conclusive evidence that there is no occasion for invoking martial law through the forceful seizure of Wards' properties by the Army.

V. The Seizure Was Not a Valid Exercise of Any "Combined War Powers" of the President and the Congress.

Apparently on the suggestion of a phrase in *Hirabayashi* v. *United States,* 320 U. S. 81, the Petition argues (p. 23) that the criminal provisions of Section 6 of the War Labor Disputes Act make any seizure deemed necessary by the President "an exercise of the combined war powers of the Congress and the President."

In the *Hirabayashi* case, Congress "ratified and confirmed" a Presidential order already issued and "authorized and implemented" further orders issued by a subordinate military officer, by providing criminal penalties for the violation of such orders (320 U. S. at p. 91). But the Petition seeks to spell out of Section 6 not only a ratification of past action, but a ratification of action not yet taken.

Section 6 of the War Labor Disputes Act merely prohibits strikes and similar interruptions in the operations of plants "in the possession of the United States." It is not limited to plants covered by Section 3 of the War Labor Disputes Act, but covers plants or facilities taken or acquired by virtue of any other federal statute. Since it applies by its wording to many situations where possession is properly acquired by the United States by virtue of express existing laws, any argument that Congress intended by it to ratify other seizures, made without warrant of existing law, is absurd.

Respondents find it difficult to take seriously the further suggestion (Petition, p. 24) that the failure of Congress to amend the War Labor Disputes Act after the prior seiz-

ure of Wards' property of 1944, amounts to a Congressional ratification of future seizures. This argument has no more relevance or persuasiveness than a contrary assertion that the abandonment of the prior seizure before the matter could be decided by the courts was an implied recognition of the illegality of the President's action.

Whether, as a matter of national policy, War Labor Board directives should be made enforceable rather than advisory is not an issue in this case. Consequently, much of the Petition and many of the affidavits should more properly be addressed to the Congress than to the courts. If the decision of the District Court is in any way delaying the solution of the problem of war time labor disputes, the cause is a reluctance to seek a clearer or a better solution from Congress than Congress has heretofore provided.

The Army has retained possession of Wards' property despite the decision of the District Court. The interference with Wards' business continues and the effects of that interference are cumulative. The Petition implies that (p. 15) this interference will continue until this court has finally acted.

Under these circumstances the Respondents are constrained to join in requesting this court to issue a writ of certiorari despite the deep conviction of the Respondents that the decision of the court below was clearly and inescapably correct.

Respectfully submitted,

STUART S. BALL,
JOHN A. BARR,
HAROLD A. SMITH,
GUY A. GLADSON,
ARTHUR D. WELTON,
CHARLES J. CALDERINI,
For Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 949

UNITED STATES, PETITIONER

v.

MONTGOMERY WARD & COMPANY, INC., ET AL.

PETITION FOR RECONSIDERATION

It is respectfully prayed that this Court reconsider its order, dated March 12, 1945, which denied the petition for writ of certiorari herein on the ground that the application had been made prior to judgment of the Circuit Court of Appeals for the Seventh Circuit.

The United States submits that for the following reasons it is in the public interest to have this case decided promptly by this Court:

The United States took possession of the plants and facilities of Ward because labor disputes between the company and its employees threatened to interrupt the nation-wide operations of Ward and because the disputes threatened to spread and to interrupt the operations of war plants in such centers of war production as Detroit, Chicago,

636174—45

San Francisco, and St. Paul. Following the decision of the District Court the United States applied for a stay of the District Court's judgment on the ground, among others, that it was necessary for the United States to continue possession and operation of the plants to prevent the resumption of labor disputes that would interfere with the prosecution of the war. The stay was granted and the United States is now in possession of and is now operating the plants and facilities covered by the Executive Order. Unless events occur that cannot now be foreseen, the United States will continue to operate the plants and facilities until this case is finally decided, subject, of course, to the possibility that the stay may be dissolved by a court of competent jurisdiction.

It may be assumed that the Circuit Court of Appeals for the Seventh Circuit will take every possible step to expedite the hearing and the decision of the appeal. Even so, it seems unlikely that this case could be heard and decided by the Circuit Court of Appeals in time to permit a final decision by this Court at this term.[1]

[1] Rule 16 of the Rules of the Circuit Court of Appeals provides that the appellee has 20 days after delivery to him of appellant's brief in which to file a reply. After the entry of the order of this Court on March 12, 1945, counsel for Ward stated informally to counsel for the government that they would not be willing to agree to shorten the time for the filing of briefs. Therefore, unless the Circuit Court of Appeals for the Seventh Circuit should modify or deviate from its own rules, it seems improbable that the case could

If this is so, more than six months must elapse before there can be a decision that finally establishes the rights and obligations of the United States and Ward in this case. The necessity for preserving industrial peace and order in the national war economy is so great that throughout this time it will be the duty of the executive arm of the government to continue the possession and operation of the Ward properties. Ward has taken the position that it will not acquiesce in the government's possession or cooperate with the government in its operation of the plants and facilities until the legal issues involved are decided by the court of last resort. Therefore even if it is assumed that the decision of the lower court is incorrect, nevertheless it will be difficult for the Secretary of War to operate the properties in an efficient and orderly manner so long as the rights of the government have not been established by a decision of the court of last resort. On the other hand, even if it is assumed that the decision of the lower court is correct, the United States, in the interests of preserving industrial peace and preventing interruptions of essential production, must continue to operate the properties until a final decision by this Court even though that course of action may require the United States to invest substantial sums of money in the oper-

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be argued in the Circuit Court of Appeals before the last week of April.

ation of the properties and to incur the risks of substantial liability to Ward. Moreover, although the United States believes that the civilian officials of the War Department and the officers of the Army who are enforcing the Executive Order and operating the properties of Ward are not subject to suits for damages in the event that the Executive Order is held to be illegal, a risk of liability remains which the officials and officers must continue to incur so long as the issues in this case have not been decided by this Court.

The issues in this case raise basic questions as to the scope of the President's power under the War Labor Disputes Act and under the Constitution to take possession of plants and facilities for the purpose of terminating labor disputes that threaten to interrupt the production of the implements of war and other essential economic services. Until these issues are finally decided, the executive arm of the government will be handicapped in its attempts to deal with these interruptions. It is anticipated that the difficulties of the problem and the necessity for dealing promptly with labor disputes will be increased and not diminished by the termination of the war in Europe. It may also be assumed that the Congress will be reluctant to enact clarifying or amendatory legislation so long as the scope of the existing statutes has not been finally decided by this Court and so long as the rights of private

persons under those statutes are the subject of litigation that has not finally been decided by this Court.[2]

The United States believes that the decision below is erroneous and that this error should be corrected. But apart from this consideration, it is important that the issues in this case be finally decided as promptly as possible. If the case is not now reviewed by this Court, the President may be left for a period of six months in doubt as to the scope of his statutory and constitutional powers to deal with economic crises that threaten to interfere with the successful conduct of the war.

Respectfully submitted.

FRANCIS BIDDLE,
Attorney General.

CHARLES FAHY,
Solicitor General.

MARCH 15, 1945.

The foregoing petition is filed in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

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[2] A number of bills to amend the War Labor Disputes Act were introduced in the 78th Congress (see 90 Cong. Rec. 3880, 4122, 4172, 4252) but no action was taken on these bills. One bill to amend section 3 of the War Labor Disputes Act, H. R. 1339, has been introduced in the present session of Congress but no action has been taken on it.

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